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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ALMA I. WAGNER, Executrix of the Estate of Robert G.
Wagner, Deceased, and UNITED STATES FIDELITY
AND GUARANTY COMPANY, a Corporation,

Appellees.

BRIEF FOR THE APPELLEES.

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Brief of Appellees Alma I. Wagner, Executrix of the
Estate of Robert G. Wagner, Deceased, and
United States Fidelity and Guaranty Company, a
Corporation.

Preliminary Statement.

This brief is filed as the joint brief of the two appellees,
Alma I. Wagner, Executrix of the Estate of Robert G.
Wagner, Deceased, and the United States Fidelity and
Guaranty Company.

Opinion Below.

There was no opinion by the Court below.

Jurisdiction.

This is an action at law, founded upon a contract and growing out of the laws of the United States providing for Internal Revenue [R. 4]. Judgment was entered in favor of appellant on October 1, 1936 [R. 27-31]. Petition for appeal was granted December 30, 1936 [R. 34], pursuant to the provisions of section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925. This appeal involves only that portion of the judgment providing for interest at the rate of 7% per annum from September 1, 1933 to August 30, 1935.

Question Presented.

Whether the principal and surety on an appeal bond executed pursuant to section 603 of the Revenue Act of 1928 are liable for interest at the rate prescribed by the Federal statute or at the legal rate prevailing in the State.

Statement.

Appellees are in accord with the statement contained in appellant's opening brief (App. Br. 2-4).

ARGUMENT.

Appellees agree with appellant's statement that a bond to pay taxes is a new obligation distinct from the tax liability underlying the bond.

United States v. Fidelity & Deposit Co. of Maryland, 80 Fed. (2nd) 24, 27;

United States v. John Barth Co., 279 U. S. 370, 73 L. Ed. 743.

The bond is a new contract obligation (*United States v. John Barth Co.*, *supra*) and as such is subject to the same rules of interpretation and enforcement as any other contract.

One of the fundamental rules of interpreting contracts is that they must be interpreted according to the law of the place where it is to be performed, or if no place of performance be indicated, then according to the law of the place where it is made.

California Civil Code, Sec. 1646;

Platna v. Vincent, 194 Cal. 436; 229 Pac. 24;

Blachman etc. Bank v. Kitcham, 36 Cal. App. 284, 171 Pac. 1084.

Hence the courts must read as a part of a contract the laws of the state existing at the time it was made.

Allen v. Allen, 95 Cal. 184, 30 Pac. 213;

Wemrich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667.

Thus the law of California, the place where the contract was made [R. 13] and to be performed [R. 4] must be read as a part of the bond.

Until the United States Collector of Internal Revenue made demand for the payment of the tax deficiency, the bond was nothing more than an executory contract. After the demand, to-wit: September 1, 1933, the obligation of appellees on the bond became fixed and the failure of appellees to comply with demand was a failure to perform the bond contract, giving to the United States of America a cause of action against appellees for damages on the contract bond and not for the tax.

Damages for failure to perform a contract to pay money, under the California law, is the principal amount of the contract, with interest thereon from the date of the said failure to perform to date of a judgment or date of payment.

California Civil Code, Sec. 3302.

As above stated, the bond was to be performed and was made in California. The appellee, Alma I. Wagner, etc., resided in Los Angeles, California [R. 4] and the appellee, United States Fidelity and Guaranty Company, was authorized to do and was doing business in California [R. 4] and the bond was executed in Los Angeles, California [R. 13]. Taxes are paid by a taxpayer to the Collector of Internal Revenue in and for the district in which the taxpayer resides. The judgment rendered herein in the Court below, together with interest on the judgment to date of payment, was paid to the Collector in Los Angeles, California.

Revenue Act of 1926, Secs. 227, 270;

Revenue Act of 1932, Secs. 53, 56;

Revenue Act of 1936, Secs. 53, 56.

The contract bond was therefore subject to the laws of the State of California and the legal rate of interest chargeable in California attached after the failure to perform the contract by appellees.

The legal rate of interest in California is seven per cent (7%):

Deerings Gen. Laws, 1931 (Vol. 2) Act 3757;
Constitution of California, Sec. 22, Art. XX.

This was undoubtedly the Court's reasoning in the case of *Maryland Casualty Co. v. United States*, 76 Fed. (2d) 626, wherein the Court held that the interest from and after the date of demand accrued at the State rate of interest, the Court saying:

“According to these cases, the present suit is not one to collect taxes, but to enforce the covenant of the bond.”

And further the Court says:

“The suit is technically not one for taxes. The surety has not promised to pay them, but to pay \$4,000.00 if Lindsay did not on May 26, 1928, pay his taxes. The penalty in a bond like this is no longer a forfeited ‘pound of flesh’, but the law follows equity in treating it as security for the performance of the conditions and will exact only enough of it to recompense the obligee for the breach of the condition.”,

which is but another way of saying that the government is entitled to its damages for the failure to perform the contract, which as has been shown above, is interest in accordance with the State law.

Conclusion.

For these reasons, we respectfully submit that the lower Court was correct in applying the state interest rate and that therefore the judgment should be affirmed. Appellees promptly made payment in full of the judgment as rendered, together with interest accrued thereon to date of payment and their obligation as thus discharged should not be disturbed.

Respectfully submitted,

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